Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

KIMBERLY GOODMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Should the Defendant be permitted to withdraw her plea prior to sentence, where the government breached the written plea argument?

2. Was Kimberly Goodman subjected to disparate sentencing under the Equal Protection Clause because the trial court speculatively evaluated her participation in the fraud, and where other co-conspirators received much lessor sentences.

3. Since the Fifth Amendment permits a defendant to remain silent at sentencing under Mitchell v. United States, 119 S.Ct. 1307 (1999) and it is an open question under Mitchell whether silence at sentence can be used against a defendant to evaluate whether she has accepted responsibility, was it an abuse of discretion and a Fifth Amendment violation for the sentencing court to have deemed Ms. Goodman's silence at sentence to be evidence of her failure to accept responsibility?

4. Were Ms. Goodman's Fifth Amendment rights violated when the U.S. Probation Officer questioned her post plea about her involvement in the fraud, without counsel and without first advising her of her right to have her counsel present?

5. Was the plea contract illusory if, contrary to its terms, it was legally impossible for Ms. Goodman to be deemed a minimal participant in the fraud under USSG 3B1.2?

6. Should the government be bound by the plea agreement and estopped from taking a position at sentencing which is inconsistent with the plea agreement that the government itself drafted?

7. Did the trial court, by stating that the existing guideline range for white collar fraud was too lenient, make the plea agreement illusory since the defendant and prosecutor had stipulated in the plea agreement that U.S. Sentencing Guidelines were controlling?

PARTIES BELOW

The parties below in the Court whose judgment is sought to be reviewed are as follows:

United States of America, Appellee

Kimberly Goodman, Defendant-Appellant

As none of the parties are corporations, there are no parent companies or non-wholly owned subsidiaries thereof.

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JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed on this writ is a judgment on direct appeal: Ms. Goodman's conviction and sentence were affirmed by the Second Circuit January 20, 1999 in United State v. Goodman, Dkt. 97-1513, 165 F. 3d 169 (2d Cir. 1999). An order denying rehearing was issued by the Second Circuit March 18, 1999.

This court has jurisdiction to review this petition under Supreme Court Rule 13 since this petition is made within 90 days of entry of an order denying rehearing of a criminal decision in the Second Circuit Court of Appeals.

UNITED STATES SUPREME COURT

KIMBERLY GOODMAN,

WRIT PETITION
Under Supreme Court
Rule 14

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

WRIT OF CERTIORARI UNDER SUPREME COURT RULE 14

KIMBERLY GOODMAN, by her counsel RAYMOND J. AAB and CAROL KAHN brings the instant writ of certiorari to review constitutional defects in her conviction and sentence in United States v. Goodman, Docket 96-CR-115 W.D.N.Y. filed August 20, 1997 and entered August 27, 1997.

Rule 10 (a) Conflict of Circuits Arguments

Jurisdiction on this writ of certiorari is predicated on Supreme Court Rule 10, in that the decision entered in this matter by the Second Circuit in United States v. Goodman, 165 F. 3d 169 (2d Cir. 1999) conflicts with other circuit courts of appeal, specifically the 10th Circuit in United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995) on an important federal question, namely whether a United States attorney breaches his own plea agreement by taking a legal position at sentence which is inconsistent with his position in the plea agreement; and should the government be estopped from taking such an inconsistent position, even if the government's change in legal position is in response to a question of the court rather than a communication initiated by the

prosecutor. Petitioner contends the government's utterance undermined the plea bargain in violation of Santobello v. New York and the Second Circuit should not have let the government circumvent its obligation to adhere to its own agreement. We contend under Supreme Court Rule 10 (a) that the Court of Appeals' approval of the prosecutor's conduct below was such a departure from accepted due process practice as set out in Santobello and United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995) as to call for exercise of this Court's supervisory power.

A second important issue worthy of this court's jurisdiction is an important 5th Amendment issue left open in Mitchell v. United States, 119 S.Ct. 1307 (1999), relating to whether a defendant's silence at plea can be used to justify a sentencing enhancement for the defendant's refusal to accept responsibility.

A third issue involves the court's discretion to consider disparate sentencing in evaluating whether to grant a minimal participant role reduction under U.S.S.G. 3B1.2.

We contend this case has a good fact pattern on which the Supreme Court can instruct the lower courts about making findings at sentences based on speculative averages in regard to the applicability of U.S.S.G. 1B1.3. The problem of "apple and orange sentencing" for codefendants to whom different guideline factors apply has troubled the Sentencing Guidelines framers. See, United States v. Joyner, 924 F. 2d 454 (2d Cir.1991). Such a concern is especially relevant in this case where the factors for comparative sentencing were never defined. Can you just pull an average participant or minimal participant out of a hat? This issue applies to all conspiracy fraud defendants where there are subgroups and unclear roles.

This case has interesting facts to explore the issue of an illegal undeliverable plea bargain (see points 4 and 5): and whether specific performance of the plea is the appropriate relief under Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976).

Relevant Statutes and Constitutional Provisions

U.S. Constitution 5th Amendment

> "No person shall be held to answer for a capitol or otherwise infamous crime..nor shall be compelled in any criminal case to be a witness against himself without due process of law."

Rule 32 (d) FRCrP

Plea Withdrawal.

> If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended or disposition is had under 18 U.S.C. 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.

Statement of the Case

An information charging one count of mail fraud under 18 U.S.C. 1341 and 18 U.S.C. 2 was filed in the Central District of California in July 1996. The parties negotiated the plea agreement in the Central District of California, one day before the statute of limitations ran. Pursuant to the agreement, the Defendant Goodman agreed to waive the statute of limitations. The case was then transferred on consent under FRCrP 20 to the Western District of New York. On October 13, 1996, Ms. Goodman appeared with new counsel before the Hon.Richard Arcara and executed the plea agreement and waiver of indictment negotiated and drafted by the government in California, and entered a guilty plea.

The Plea Agreement

The plea agreement contained a stipulated basis for the

plea: Kimberly Goodman, the defendant was a licensed security broker. She was the most minor player in a security fraud conspiracy based in California by which the major player, Steve Wyman, an investment adviser, over a period of five years embezzled $110,000,000 from various institutional investors which were largely cities in California that had invested funds with him. Goodman was not held accountable for the $110,000,000 scheme but only for a portion of a single sub-scheme involving the city of Loma Linda.

Wyman hired many people directly to implement his fraudulent schemes. Goodman never worked for Wyman. Goodman was at first a broker for an investment company, REFCO, with which Wyman invested his clients' money. Wyman looted the accounts of his clients and invested their money in his own name. Goodman acknowledged her involvement in one act of cover up: on July 23, 1991, Ms. Goodman acting as an agent of REFCO sent an audit confirmation to the City of Loma Linda in which she represented that the city's cash account balance at REFCO was $2,699,250.56 when it actually was less than $3,000. Goodman received the false accounting balance information from a co-schemer in Wymer's office in Irvine California who kept a notebook containing the false information that was to be reported to clients. The figure contained in the Wymer notebook was identical with the one that defendant Goodman reported to the City of Loma Linda.

Wymer made defendant Goodman during the period 1987-1991, gifts of a Jaguar and, after the Jaguar was totaled in an accident, a Mercedes, while Wymer's scheme to defraud various cities was ongoing. These gifts were made before Goodman's involvement in the Loma Linda sub-fraud, and the government stated that it did not believe that these gifts were a quid pro quo for Goodman's participation in the fraud. (A 68 – 79) Wymer (who was subsequently convicted of a complex series of fraud schemes) was arrested in 1991. The plea agreement with the government included a stipulated factual basis as follows, at (A 26):

> You and *this* office agree and stipulate to the following statement of facts which form the basis

for the entry of the plea of guilty to the information and which also constitute relevant conduct pursuant to U.5.S.G. §121.3

(a) Defendant Kimberly Goodman worked at REFCO Securities, a broker/dealer from the mid 1980s through early 1992. Through her work at REFCO she came to know Steven Wymer, an investment advisor in Irvine, California. Wymer would cause individuals and municipalities from around the country to deposit excess or surplus funds under his companies? (Denman & Company and Institutional Treasury Management) control. He promised his clients a high rate of return in government securities. When clients invested, he had them send their money to REFCO. Almost immediately he would raid those accounts and use one client's money to pay the other clients to whom he'd also promised a high rate of return.

(b) In order to make the plan succeed Wymer needed to create and furnish to his clients false documentation showing account balances at REFCO that did not in fact exist. He enlisted the assistance of an employee of his who prepared bogus monthly activity reports, sometimes on REFCO letterhead the employee created herself and at other times on actual REFCO letterhead supplied by the defendant, Goodman. These "REFCO documents" contained false trading account information and served to confirm to Wymer's clients that they had funds deposited at REFCO that were not in fact there.

(c) Because the accounting firms that had audited the clients' financial condition would periodically ask for verification of the clients' account balances at REFCO, it also became necessary for Wymer to enlist an insider at REFCO to "verify" client balances when in fact, the clients had no money at REFCO or significantly less than what Wymer had told them. For this purpose he turned to defendant Kimberly Goodman. Wymer had the clients send their audit confirmation queries to Goodman's attention at REFCO. With these queries the clients requested verification of their account balances, securities held and interest paid on the cities account at REFCO. The "REFCO" responses prepared by defendant, Goodman, in New York (after consulting with Wymer employee in California, who had prepared the fraudulent monthly activity reports) relied on by the cities and their auditors for projecting municipal spending.

(d) When defendant Goodman, in New York, received the cities' audit confirmation inquiries, she would telephone Wymer's office to ascertain what information the clients' city had

been told by Wymer. Defendant Goodman would then place the false information (such as information concerning the clients cities account balance) on the confirmation and would often fax a copy to Wymer's office to ensure that she was reporting the "correct" falsified information. Thereafter, defendant Goodman would sign her name to the audit confirmation and cause it to be placed in the U.S. mail where it was subsequently received and relied on by the client cities and their auditors.

(e) In the count alleged in the information, defendant Goodman on or about July 23, 1991 sent an audit confirmation response to the City of Loma Linda in which she represented that the City's cash account balance at REFCO was $2,699,250.56. She received that false information from another co-schemer at Wymer's office in Irvine, California who kept a note book containing the -false information that was to be reported to the clients. The figure contained in the Wymer notebook was identical to the one that defendant Goodman reported to the City of Loma-Linda. The information was false because at the time that defendant Goodman represented -that balance to the City, the City of Loma -Linda actually had slightly less that -$3,000.00 in its account at REFCO.

(f) Wymer made defendant Goodman gifts of two luxury automobiles, specifically a new Jaguar XJS and a new Mercedes 560 SEL during the pendency of the scheme from late 1987 through December 1991 when Wymer (who was subsequently convicted for a complex series of fraud schemes) was arrested. During that time, Wymer also funded a trading account at REFCO that was in defendant Goodman's exclusive control in a total amount of $178,000.00.

(g) A forensic handwriting examiner identified defendant Goodman's handwriting on the following documents which included:

(1) A June 20, 1989 audit confirmation for the City of Loma Linda which confirmed an account at REFCO at a time when the City had no account at REFCO;

(2) A July 19, 1987 audit confirmation for the City of Loma Linda which appeared to "verify" an almost three million balance in the City of Loma Linda's name at REFCO when in fact there was less than $9,000; and

(3) An October 25, 1990 audit confirmation for the City of Loma Linda wherein defendant Goodman represented that the City of Loma Linda's account balance at REFCO was over $2.6 million

when in fact was $2.00. Further, the handwriting examiner also identified defendant Goodman as the writer of the July 23, 1991 audit confirmation for the City of Lou Linda which constitutes the basis of the single count information against defendant Goodman.

(h) A fingerprint analyst identified defendant Goodman's fingerprint on the October 25, 1990 audit confirmation response.

(i) The City of Loma Linda and its auditors relied on the information contained in the audit confirmation prepared by and mailed to them by defendant Goodman. But for the cities' reliance on defendant Goodman's representations and omissions, the City would not have kept its funds under the supervision of Steven Wymer and would not have suffered an after recovery loss of less than $800,000 but more than$500,000. See U.S.S.G. 2F1.1(b)(1)(k) (loss amount less than $800,000 but greater than $500,000).

(j) REFCO compliance officers would have testified that defendant Goodman should not have had client cities directing their audit confirmations to her and that she was acting improperly and not in accordance with REFCO procedures when she contacted Wymer's office to receive the false account balance information which she relayed to the client cities. Moreover, REFCC officials would have testified that it is a violation of company policy to receive cash payments and automobiles from clients/investment advisors.

The stipulated facts recounted above are included in the plea agreement as paragraph 4. In paragraph 5 of the plea agreement the government and defendant agreed to a base offense level of 6, a loss of between $500,000-800,000 for an addition of 10 points in the Sentencing Guidelines, an adjustment of +2 for more than minimal planning, and a reduction of -4 points as a minimal participant adjustment under U.S.S.G. 3B1.2, and a reduction of 2 points for acceptance of responsibility -2 under U.S.S.G. 3E1.1, **applying the applicable Sentencing Guidelines**. (The boldface will become important as the story unfolds.) With a total adjusted offense level of twelve (12) and a criminal history category of one, the parties agreed that the defendant's sentencing range would be 10-16 months (Zone C).

Paragraph 5 of the plea agreement notes **both parties waive the right to argue that other specific offense characteristics or departures may be appropriate,** except that the defense may argue exceptional family circumstances and the government may oppose this request.

Paragraph 6 of the plea agreement spells out very limited conditions subsequent under which the parties are relieved from the sentencing factors stipulation set out in paragraph 5 of the plea agreement.

"You understand there is no agreement as to your criminal history or criminal history category and that your criminal history could alter your offense level if you are a career offender or if the instant offense was a part of a pattern of criminal conduct from which you derived a substantial portion of your income. In the event your offense level is so altered, the parties are not bound by the sentencing factors stipulation set forth in paragraph 5."

None of the paragraph 6 conditions were met in this case.

By implication in the plea agreement, the parties agreed to preserve the appellant's right to appeal if the Court's sentencing calculations differed from those set forth in par. 5 of the plea agreement, with the exception that if the court's calculations differed from defendant's as to criminal history she could appeal. Paragraph 12 of the plea agreement indicates the agreement does not bind the court or probation; this is a plea agreement under FRCrP Rule 11 (e)1(B).

Under paragraph 8 of the plea agreement, the government may recommend a two point reduction for acceptance of responsibility if defendant Goodman demonstrates acceptance at to any time until sentencing.

Under paragraph 9 of the plea agreement, the government retains the right to provide supplementary fact information at sentencing covering "all other relevant information with respect to (defendant's) background, character and conduct." (including uncharged crimes or conduct involving coconspirator Wymer.) Further under paragraph 9 of the plea agreement, the government can advise the court at sentencing of any failures of the defendant to fulfill her obligations under the agreement. Plea agreement paragraph 9 does not give the government any right to argue legal positions of sentencing which are inconsistent with the plea agreement's paragraph 5 if the defendant complies with paragraph 5 and no facts disclose a violation by defendant of paragraph 6 of the agreement.

Wymer gave Goodman the cars prior to July 23, 1991. The plea agreement's stipulated facts in paragraph 5 fail to connect Wymer's gifts to Goodman of the two cars to any misconduct prior to the July 23, 1991 audit fabrication.

During the plea colloquy the court conceded that defendant Goodman did not know of many of the events in the larger conspiracy set out in the stipulated facts of the plea agreement.

First Pre-sentence Report

A pre-sentence report was prepared by the United States Probation Department for the Western District of New York. Defendant Goodman submitted a written statement to probation of her version of the offense set forth at p. 8-9 of defendant's main brief to the 2nd Circuit. Based on Ms. Goodman's statement the Probation Department recommended that Ms. Goodman receive a two (2) point level reduction for acceptance of responsibility because she timely notified the authorities of her intention to enter a guilty plea. Additionally the pre-sentence report recommended a 4 level reduction based on Goodman's minimal role under U.S.S.G. 3B1.2(b).

Probation justified Goodman's minimal role scoring in its report as follows:

"The U.S. Attorney's office in the Central District of California has determined that the mail fraud perpetrated by Steven Wymer was extensive and involved approximately $100,000,000. The tentacles of his scheme reached out to many cities and municipalities throughout the United States. It was felt that despite the defendant's plea which incorporates a loss of between $500,000 and $800,000, her role in the fraud was minimal. In addition, it was Wymer who was the primary mover in the scheme to defraud. It is apparent that the defendant was along for the ride and was most likely not aware of the scope of Wymer's fraud. Thus she is entitled to a reduction for minimal role."

The trial judge, the Hon. Richard Arcara, adjourned sentencing because he felt the stipulation of fact in the plea agreement was inconsistent with a minimal role reduction -4 points and wanted

more information on Goodman's role in the $700,000 loss to Loma Linda.

The government attorney at this pre-sentence appearance, breached the plea agreement by then ascertaining a legal position to the court inconsistent with the government's own plea agreement (paragraphs 5 and 6), as reflected in the transcripts (A 40):

AUSA Bruce: Judge as I understand the position of the Second Circuit, if we're looking solely at her, at her conduct, she can't be a minor or minimal participant, and I think that is where the Court is going.
THE COURT: Do you think that she, based on this plea agreement, those facts, that she would be entitled to any reduction?
AUSA BRUCE: Based on the $700,000, no. (A 40)

The relationship between the AUSA Werner-Simon who negotiated the plea agreement in California and AUSA Bruce who signed it for the government in the WDNY was a bit strained. Although AUSA Bruce repeatedly stated to the court he adopted the AUSA from California's position in full he repeatedly disavowed her legal and factual position, first at (A 40), on January 13, 1997 then in his pre-sentence memo (A 42-48), without the defendant doing anything to violate her part of the plea bargain.

By the next adjourned date the AUSA from California, Ms. Werner-Simon, speaking for the AUSA from the WDNY, presented the court with a white ring binder containing 24 exhibits and a memo of law in support of Goodman's sentence as a minimal participant in the Loma Linda sub-conspiracy. The government's notebook also emphasized Goodman's minimal culpability in relation to seven other participants in the larger scheme who received extremely light sentences: the major kingpin, Wymer, for a $100,000,000 fraud received only 14 years reduced to seven years in prison and a large forfeiture (A 40). His number two man who participated in 1000 separate frauds received only two years in prison. The next five down the list

who also participated in thousands of individual forgeries and many conspiracies were not criminally prosecuted. Goodman was far less culpable than any of the other participants according to the government's notebook which was in presented to the trial court as a sealed exhibit (Ex 13) and was before the Circuit on direct appeal.

Judge Arcara angrily accused the government of result oriented pleading - saying to the AUSA Werner-Simon you'd do anything to keep Goodman out of jail on a Zone C bargain, even distort the nature of minimal participation, and distort the facts. (A 53 -54). Judge Arcara explained in court that he had just returned from a federal sentencing conference where it was agreed that all relevant conduct should be presented to the court and the court must look to the average culpability of a participant in an average fraud of the same total dollar volume, not the relative culpability of the codefendants in the instant case, in establishing minimal participation. Judge Arcara was concerned that the stipulated facts in the plea agreement indicated that Goodman had received approximately $150,000 in new cars and access to a trading account of $178,000, which she lost and repaid, based on her participation in the Loma Linda sub-fraud, in which the city of Loma Linda lost $770,000. The court reasoned that based on those numbers, she was not a minimal participant.

The court appears to say that the plea agreement is illegal: THE COURT: "Just read the plea agreement, Mr. Bruce. I know you didn't handle the plea. I know it was worked out in California. You look at the plea agreement, there's no way you can justify a reduction of four levels, hardly maybe even two levels. I don't see any reduction at all. . . . This whole activity could never have taken place without her help. It could never have happened, but for her providing that false information, this $500 to 800 thousand dollars. That's hardly someone who has an insignificant or minor role. She was an integral part of this particular fraud based upon the facts in the plea agreement" (A 40).

After the government issued its supplemental fact notebook, the probation department issued a second probation

report dated April 18, 1997 changing its evaluation of Goodman's role in the crime from minimal to minor.

On May 16, 1997 the trial court heard argument from AUSA Werner-Simon supporting her continued belief that Goodman deserved the -4 point minimal role adjustment. The court asked about gifts Goodman had received from Wymer, namely, the two cars and the $170,000 trading account. AUSA Werner-Simon replied that she believed Goodman received these gifts as a thank you for legitimate trades on behalf of Wymer (A 55-57; A68-79), unrelated to criminal activities by Goodman. AUSA Werner-Simon indicated that Wymer's claims contained in his earlier affidavit, that he gave money and jewelry to Goodman were untrue. Between Wymer and Goodman, the AUSA believed Goodman (A 50). The court said these claims were sworn to by Werner-Simon in an earlier proffer affidavit in Wymer's case and could not be recanted to protect Goodman. The government continued to advocate for the -4 point minimal role adjustment on the theory that Goodman was the least culpable.

Further, the trial judge frankly stated (A 50) that the federal sentencing guidelines are too lenient on fraud, too tough on drugs. However the defendant and the government in the plea agreement expressly stipulated that they would be bound by the 1995 Sentencing Guidelines and, as noted below, the Defendant Goodman changed her position in reliance on the government's promise to follow the 1995 guidelines by waiving the statute of limitations which was to have run the day after Goodman agreed to plead.

Motion to Withdraw Plea

On June 23, 1997 a month before sentencing, Goodman moved to withdraw her plea under FRCrP Rule 32 (e). Her counsel filed an affirmation July 21, 1997 in support of the motion claiming the government breached the plea agreement by advocating a legal position inconsistent with the plea agreement point's scoring, by advocating an increase in the Guidelines level

based on an abuse of trust adjustment and the removal of an adjustment for acceptance of responsibility. (A 42-48) Defense counsel argued in his memorandum of law that the mere fact that the government attempted in its memo to say that its legal conclusions were not meant as advocating a position, did not save the government from violating the plea agreement since the government was in fact advocating a contrary legal position in its law memo.

Proof of Promissory Estopple

On July 23, 1997 in Goodman's affidavit in support of the motion to vacate the plea Goodman swore that in a conference call with her attorney and the AUSA for the Central District of California on June 20, 1996, she was advised that the statute of limitations was about to expire and she would either have to sign an agreement to extend the statute of limitations or face indictment in California. She signed a waiver of the statute of limitations. Her affidavit further stated that during the conference call she was advised that if she pled guilty she would "qualify" for a Zone C sentence, avoiding imprisonment. If she failed to extend the statute of limitations and plead, she would receive a jail sentence.

Trial Court's Order Denying the Motion to Vacate Plea

On August 18, 1997, the trial court denied Goodman a downward role adjustment as a minor or minimal participant finding that she was pivotal in concealing the Loma Linda sub-scheme by providing a false audit confirmation. The court found Goodman failed to prove she was less culpable than the average participant in the crime, notwithstanding that the court failed to establish who the other players in the Loma Linda fraud were, and what was their average culpability; thus, that finding was totally speculative. The court found Goodman received over $300,000 in illegal profits from the scheme. (i.e. the two cars and the $178,000 investment monies). However, the uncontradicted proof was that

Goodman received legitimate gifts (the cars) from Wymer unrelated to the Loma Linda scheme, and that she had repaid the $178,000.

Recognizing that both probation and the U.S. Attorney recommended that Goodman receive a 2 point downward adjustment for acceptance of responsibility, the court denied the reduction. The court found Goodman's pre-sentence statements to probation denying criminal intent to defraud, and claiming negligence, were inconsistent with her plea allocution and her prior written statement to probation. The court also relied significantly on Goodman's making a motion to vacate the plea as a failure by her to accept responsibility.

Thus, the Defendant's own words to the Probation Officer who interviewed her without counsel in respect of the pre-sentence report, were used against her by the Sentencing Court. If Ms. Goodman had been advised by the P.O. that she had a right to counsel, that anything she said could be used against her, and that she had a right to remain silent about her involvement in the fraud, then her statements would not have formed the very basis for the Court's finding that she failed to accept responsibility.

Ultimately the court sentenced Goodman to thirty (30) months incarceration.

LEGAL ARGUMENT

Point I:

THE DEFENDANT SHOULD HAVE BEEN PERMITTED TO WITHDRAW HER PLEA, WHERE THE GOVERNMENT HAD BREACHED ITS PLEA AGREEMENT

The government breached the plea agreement when prior to sentencing in open court in its pre-sentence memo, it took a position contrary to that stated in the plea agreement, which the government itself drafted. This is so, notwithstanding that the government's contradictory position was solicited by the trial

court. The government's conduct was a clear violation of due process under United States v. Lawlor, 1999 U.S. App. LEXIS 2701 (2d Cir. 2/23/99); United States v. Corsentino, 685 F. 2d 48 (2d Cir. 1982); as well as under the tougher standard of United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995). In view of these precedents, the defendant's plea herein was not voluntary under Santobello v. New York, 404 U.S. 257. Furthermore, in the Tenth Circuit, the prosecution is barred from doing what the prosecutor did in this case, whether or not the prosecutor's contradictory statement is deemed "supplemental" (as the Second Circuit in this case determined).

That the government rationalized its breach of the plea agreement in language in the agreement that "neither the court nor counsel should view the memorandum as advocating a position by the government on either issue addressed", does not justify its taking a contrary position. The government's pre-sentence memo constituted a position advocating an upward modification which was inconsistent with (paragraph 5, p.12) of the plea agreement. Since the defendant Goodman had not herself breached the plea agreement, the government had no right to take legal positions inconsistent with its own plea agreement, (A 40). This is a gross due process violation under Santobello v. New York, 404 U.S. 257, rendering defendant's plea involuntary. "A plea bargain is enforceable and a prosecutor's failure to comply with its terms can in some instances render a defendant's plea involuntary and thereby undermine the constitutional validity of a conviction based on a plea." Additionally under Supreme Court Rule 10b, there appears to be a conflict between the Second and Tenth Circuits. See, United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995) as to what conduct by the government in advocating new facts or law at sentencing violates the plea agreement. In Cooper, any facts submitted by the government after the plea which contradict the plea stipulation are a breach of the plea agreement, not a legal supplement of facts. Thus, the Supreme Court should take this case to unify the law of the Circuits concerning whether the government's contradicting its own stipulated facts prior to sentence requires that the plea be vacated as an involuntary plea.

The Second Circuit erroneously relied on United States v. Merritt, 988 F. 2d 1298,1313 (2d Cir. 1993) to find the prosecutor's legal arguments in support of sentencing harmless, because harmless error analysis should not apply to violations of plea agreements by the government under Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976); furthermore, on the facts herein, the breach was not harmless. Remand for re-sentencing before a different judge's the appropriate remedy under United States v. Lawlor, 1999 U.S. App. LEXIS 2701 (2d Cir. 2/23/99).

Defendant Goodman's character was good; she was a lamb by comparison to her security fraud codefendants and Goodman voluntarily pled on the day the statute of limitations ran to the maximum count the government had evidence on which to convict her. Goodman's sentence for covering up prior embezzlements and the Loma Linda sub-fraud by co-conspirators was far higher than the co-conspirators who initiated and orchestrated 1000 of embezzlements. Additionally, as stated above, harmless error analysis doesn't apply to violations of plea agreements by the government. See, Palermo v. Warden, 545 F. 2d 286 at n. 13 (2d Cir. 1976).

Point II:

GOODMAN WAS SUBJECTED TO DISPARATE SENTENCING UNDER THE EQUAL PROTECTION CLAUSE

Goodman was subjected to disparate sentencing under the equal protection clause because the trial court speculatively evaluated her participation in a sub-fraud without any reference whatsoever to the roles of participants in that sub-fraud and, was Goodman improperly not compared to her codefendants' massive heightened culpability in the primary fraud, thereby rendering U.S.S.G. 1B1.3 relevant to all the codefendants, except to Goodman.

The trial court's July 1997 decision denying Goodman the four (4) point reduction, and finding she was a significant

participant in the Loma Linda sub-scheme was based on total speculation since no other participant in the Loma Linda sub-scheme was identified, nor their roles established; and in view of the government's own previously stated position (A 51-55) that even regarding the Loma Linda sub-fraud, Goodman was only a minimal participant. Thus, the Court's basis for rejecting the 4 point reduction for minimal participation was purely speculative, and was not based on evidentiary findings.

Sentencing Guideline 3 B1.2 speaks of *usually* ignoring comparable people of the larger conspiracy where someone is only charged with responsibility for a sub-conspiracy, which language implies that sometimes the comparative culpability of the co-conspirators to the wider conspiracy is relevant for disparate, or comparative sentencing. The trial court here repeatedly refused to consider the huge disparity between the sentences given to Wymer and the other much more culpable co-conspirator's, who defrauded 20 cities over 4 years out of some $100,000.000. Goodman was a tiny player to a cover-up of a single sub-fraud, after others had already defrauded Loma Linda out of $700,000. The Court refused to consider disparate sentencing or to acknowledge that the trial court had any discretion to make such a comparison under U.S.S.G. 3B 1.2(b). See, (A 68-79) saying because she, Goodman, was charged with the smaller offense and was guilty of more uncharged crimes, she wasn't entitled to a downward departure for minimal participation. But, United States v. Joyner, 924 F. 2d 454 (2d Cir. 1991) indicates the Court does have such discretion. Even though United States v. Lewis, 93 F. 3d 1075, 1085 (2d Cir. 1996) denies a minor role adjustment when a defendant's base level offense is calculated on the basis of the conspirator's somewhat limited role in the conspiracy - the court in our case only confirmed that Goodman participated in one act of wrong doing. (See, A 64-67). Thus the trial court should not have looked to the possibility of appellant's larger role in the conspiracy in calculating her base offense level, when in fact no larger involvement existed. The trial court should have considered that the government itself believed that Goodman did not know or understand the scope of

the criminal venture, and that her role vis-a-vis co-conspirators was minimal, and that she profited minimally from the conspiracy in comparison to her co-conspirators. The 4 point downward adjustment should have been granted, analogous to United States v. Garcia, 920 F. 2d. 153 (2d Cir. 1990) and United States v. Westerman, 973 F. 2d 1422 (8th Cir. 1992).

As a policy matter, this case provides the Supreme Court a good fact pattern to instruct the lower courts how to evaluate average participation in a sub-fraud under U.S.S.G. 3.1.2b where some co-defendants are subject to U.S.S.G. 1B1.3 for having participated in multiple frauds, while others aren't; and to guide trial courts in evaluating the average participation of a conspiracy member, where the average participants' roles are not clearly identified in the sub-conspiracies, and the relative weights given each sub-conspiracy in their total sentencing is not discussed. We believe the trial judge's findings of average participation proportion and amount of wrongful gain are based totally on speculation and require remand, but remand to what standard? The Supreme Court must set the standard. The slaps on the wrist given the co-conspirators should have weight in Goodman's sentencing and Lewis shouldn't bar applying a disparate sentencing analysis.

Point III:

SINCE THE FIFTH AMENDMENT PERMITS A DEFENDANT TO REMAIN SILENT AT SENTENCING UNDER *MITCHELL V. UNITED STATES, 119* S.CT. 1307 (1999) AND IT IS AN OPEN QUESTION UNDER MITCHELL WHETHER SILENCE AT SENTENCE CAN BE USED AGAINST A DEFENDANT TO EVALUATE WHETHER SHE HAS ACCEPTED RESPONSIBILITY, IT WAS A GROSS ABUSE OF DISCRETION AND A FIFTH AMENDMENT VIOLATION TO ENHANCE GOODMAN'S POINT SCORE TWO POINTS AND INTERPRET GOODMAN'S SILENCE AT SENTENCE AS A REFUSAL TO ACCEPT RESPONSIBILITY.

This court should accept this writ to resolve an important question involving the scope of a defendant's Fifth Amendment rights left open in Mitchell v. United States, 119 S.Ct. 1307 (1999). This very issue arises in our case and should be addressed since the trial Court denied Goodman a two point sentencing reduction based on acceptane of responsibility, predicated on uncounseled statements she made to the Probation Officer during her pre-sentence interview. Further, this Court needs to address the very important issue applicable to innumerable similar situations concerning the applicability of a defendant's Fifth Amendment rights to remain silent about her involvement in criminal conduct during a pre-sentencing probation interview. In a case where a defendant had counsel, which is in virtually every case, the defendant should not be questioned at a pre-sentence interview without counsel present, or without counsel specifically and clearly waiving counsel's presence.

Point IV:

SINCE GOODMAN CHANGED HER POSITION RELYING ON AN UNDELIVERABLE PLEA BARGAIN BY WAIVING THE STATUTE OF LIMITATION ON THE DAY BEFORE IT RAN, HER REMEDY IS SPECIFIC PERFORMANCE OF THE AGREEMENT

The trial court stated at (A 40) that the plea bargain was internally inconsistent and undeliverable because the stipulated facts admit more than minimal participation. Yet Goodman changed her position to her detriment by signing a waiver of the statute of limitations in reliance on this same plea offer. In, Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976) the Second Circuit states:

"when a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. . . . Neither the inadvertence of the breach nor its possibly harmless effect obviated the need for remand to the state court for appropriate relief? Clearly then Santobello requires relief when the prosecutor fails to fulfill promises within his power made in

negotiating a plea bargain? We believe that the reasoning underlying Santobello applies no less when the prosecutor makes unfulfillable promises in negotiating a plea. More importantly the voluntariness of a plea induced by unfulfillable promises is of course open to grave doubt, Brady v. United States, 397 U.S. 742, 755.

In Palermo, 545 F. 2d 286, at 296, specific performance of the unfulfillable plea was the due process remedy. A similar remedy should be applied here. It matters not that the government negotiated in bad faith or accidentally negotiated a legally impossible plea agreement inconsistent on its face. Since Goodman changed her position in reliance on this undeliverable agreement by waiving the statute of limitations, her bargain should be delivered, namely, a Zone C sentence, or she should be permitted to withdraw the plea under FRCrP 20 (c) and the case should be restored to the California District Court docket.

Although this argument was not raised below, the issue of coerced plea was raised, and the facts are within the record of appeal. The other issues were preserved on the direct appeal record.

Point V:

THE TRIAL COURT'S STATED BELIEF THAT THE EXISTING GUIDELINE RANGE FOR WHITE COLLAR FRAUD WAS TOO LENIENT REQUIRES THAT THE DEFENDANT OBTAIN SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT, OR THAT SHE BE PERMITTED TO WITHDRAW HER PLEA

This point deserves to be addressed for the same reasons that Point IV deserves to be addressed. If defendant Goodman changed her position by waiving the statute of limitations and agreeing to an illusory plea, and in view of the fact that the trial court would not abide by the 1995 fraud Guidelines, Goodman's plea was not voluntary and she is entitled to relief under Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976), namely, specific performance. Although this factual issue wasn't raised

below, the matter of a coerced plea was raised, and specific performance or vacation of the plea was sought below. Since the appropriate facts are clear from the record, this court should address issues on the writ of certiorari, and should not require defendant to file a writ of habeas corpus under 28 U.S.C. §2255 to address these issues.

FOR THE REASONS STATED THE WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, N.Y.
June 10, 1999

YOURS, ETC.

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